Ombudsman's Determination

Applicant	Ms L
Scheme	NHS Injury Benefit Scheme (the **Scheme**)
Respondent	NHS Business Services Authority (**NHS BSA**)

Outcome

1. I do not uphold Ms L's complaint and no further action is required by NHS BSA.

2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Ms L's complaint is that she has been refused a Permanent Injury Benefit (**PIB**).

Background information, including submissions from the parties

4. The sequence of events is not in dispute, so I have only set out the material points. I acknowledge there were many other exchanges of information between all the parties.

5. The relevant regulations are contained in the National Health Service (Injury Benefits) Regulations 1995 (as amended). Regulation 3 states:

"Persons to whom the regulations apply

(1) ... these Regulations apply to any person who ... ... sustains an injury, before 31st March 2013, or contracts a disease before that date, to which paragraph (2) applies.

(2) This paragraph applies to an injury which is sustained and to a disease which is contracted in the course of the person's employment and which is wholly or mainly attributable to his employment and also to any other injury sustained and similarly, to any other disease contracted, if –

(a) it is wholly or mainly attributable to the duties of his employment; ..."

6. Regulation 4 sets out the scale of benefits which may be paid and provides that a PIB shall be payable to any person to whom regulation 3(1) applies whose earning ability is permanently reduced by more than 10% "by reason of" the injury or disease.

7. Ms L was employed as a Staff Nurse in long term and acute elderly care. She began her nursing career in 1984. She left NHS employment on 1 July 2015, following a period of sick leave due to "back problems".

8. In September 2015 Ms L was granted ill health retirement. In July 2016 she applied for a PIB, just short of her 50th birthday.

9. In her application Ms L detailed her injury as:

   "Early onset degenerative disc disease at multi levels with associated left sided degenerative scoliosis, severe stenosis, nerve root impingement, nerve root compression compromise, facet joint degeneration, lumbar arthritis, left sided sciatica."

10. In a personal statement Ms L said, more likely than not, the degenerative disease of her spine was as a direct result of the repetitive excessive trauma of lifting and handling patients (manually and later with adaptations) over her thirty-year career in the NHS.

11. NHS BSA turned down Ms L's application after obtaining the opinion of its medical adviser (**MA**) that, on the balance of probabilities, the medical evidence did not confirm that her degenerative back disease was contracted in the course of her NHS employment and was wholly or mainly attributable to her NHS employment. As there was no attributable condition there was no permanent loss of earnings ability (**PLOEA**)

12. A summary of the medical evidence and the advice NHS BSA received from its MA is provided in the Appendix.

13. Ms L invoked the Scheme's two-stage internal dispute resolution (**IDR**) procedure. At IDR stage 1 Ms L said:-

    - Following a spinal fusion, she now faced further surgery due to developing junctional kyphosis. She was currently housebound and only able to go out in a wheelchair or a car.

    - She noted the decision stated: "they are unable to conclude that you have suffered an injury that is wholly or mainly attributable to the duties of your NHS employment". If the Scheme's MA was unable to conclude that the injury was not wholly or mainly attributable to the duties of her NHS employment then that suggested the MA had been unable to reach a decision and therefore it was not justifiable to reject her application.

    - There was now overwhelming evidence to suggest that the trauma was almost certainly as a direct result of repetitive strain injury in the workplace.

- Reference had been made to the fact that no injuries or incidents were documented in her personnel file. She took pride in the fact that in thirty years she had never taken time off sick in relation to back problems and had managed her back problems with analgesia and exercise.

- She had never claimed to have sustained an injury or been involved in an accident whilst in NHS employment. Her claim was on the grounds of long-term repetitive strain injury caused by thirty years of moving and handling patients (with and without adaptations).

- The MA had referred to a letter dated 11 June 2014 from her neurologist, a Mr Pesic-Smith. But her neurologist was a Mr Tizzard.

- The MA had referred to an MRI scan in 2000 which revealed the onset of the degenerative disease and took the view that this showed her susceptibility to the disease. This was no more than speculation. It was her belief that the scan indicated that the damage had already occurred due to excessive repetitive strain injury of moving and handling patients (with and without adaptations).

- The MA's suggestion that the underlying disease process causing her disability and inability to work was constitutional and likely to have occurred regardless of her occupation was again mere speculation. There was no evidence to support the view.

- The overwhelming amount of evidence that she had submitted meant, on the balance of probability, that the degenerative condition had been contracted over the course of her NHS employment and was therefore wholly or mainly due to that employment.

- Evidence to support the correlation between back injuries and disease was now well documented.

- A recent study by "Lumbacurve" found that nurses exhibit the highest incidence of back pain and back problems requiring medical or hospital intervention and were the highest ranked, across all occupations, for back injuries resulting in absenteeism from work.

- Another recent study found that 80% of nursing staff in an acute care facility suffered back pain at some point in their career, with a third experiencing symptoms for at least a month. The two main contributory factors were found to be lifting and transferring patients and was most prevalent amongst staff based on the orthopaedic ward. The incidence of back pain was twice as prevalent in female staff. Length of service was a significant factor in relation to back injury and disease and younger nurses were at greater risk of developing back problems.

- A recent article in "Nursing Matters" recognised that work related muscular disorders (**WMSD**) are an occupational hazard for health care workers. Nurses

maintaining deviated postures many times a day resulted in muscle damage due to abnormal force. Poor lifting technique placed excessive stress on the lower back. The article found that more than half of sickness/absence was due to WMSD and the most common affected area was the lower back.

- Regarding PLOEA. Her Tier 2 ill health pension award at age 49 was made because it was deemed that she was permanently incapable of any employment to age sixty. Therefore, there was an eleven years loss of earnings.

14. NHS BSA referred Ms L's case back to its MA who informed NHS BSA:

"The evidence overall is considered to indicate that this applicant has extensive degenerative disease of the spine. It is accepted that she developed or "contracted" this disease during the period when she was employed as a nurse. There is insufficient evidence to indicate that her symptoms started whilst working, on any particular day.

It is not accepted that degenerative disease of the spine…arose wholly or mainly due to her NHS duties. In this case, the work duties are not considered to have caused, accelerated or triggered her disease or precipitated absence from work at a point in her career where she would otherwise have been fit to continue work, based upon all of the evidence and on current medical understanding of the factors that cause degenerative disease of the spine."

15. NHS BSA accepted the MA's opinion and turned down Ms L's stage one appeal:-

- Her reference to the comment "they are unable to conclude that you have suffered an injury wholly or mainly attributable to the duties of your NHS employment" did not mean that a decision was not made. It meant the MA was unable to conclude that her claimed condition was wholly or mainly attributable to her NHS employment.

- It noted the MA's opinion on her appeal that while she had developed or contracted the degenerative disease whilst in NHS employment it was not wholly or mainly attributable to her NHS employment.

- Noting her comment that she had never taken time off work in relation to her back problems, it said to satisfy the criteria for a PIB there must be contemporaneous evidence to show that the claimed condition was wholly or mainly attributable to her NHS employment.

- Referring to her assertion that her Tier 2 ill health retirement award proved that there had been eleven years of loss of earnings, it said as it was not accepted that her claimed condition was wholly or mainly attributable to her NHS employment it could not consider the PLOEA. That did not mean she did not have a loss of earnings ability, but for the purpose of the PIB claim it could only consider PLOEA by reason of the accepted condition.

16. Ms L submitted a further appeal. She said:-

- Prior to the 1992 Manual Handling Operations Regulations nurses were taught patient handling as lifting, lowering, holding, pushing using the bodily force of the carer and during a shift a nurse would manually lift 20 to 30 patients some of whom were confused, agitated and aggressive and weighed over 20 stone. Over her nursing career she had suffered several acute episodes of back pain. The chronic back pain had been managed with physiotherapy, analgesia and anti-inflammatory medication. In April 2015 due to the severity of her symptoms she sought early retirement at age 48. In January 2016 she had an epidural and a nerve block treatment repeated with almost no effect. In March 2016 an MRI scan revealed a marked degenerative lumbar scoliosis and in June 2016 she underwent a lumbar fusion and correction of lumbar kyphoscoliosis. In February 2017 she underwent an extensive thoracic fusion.

- While her physical function had improved her mobility remained restricted. Her health condition had had a devastating impact on her life. She had been robbed of her life vocation, nursing. She had been a very fit and active person, but now she was unable to participate in the activities she had previously enjoyed. She was confined to the house relying on friends and relatives who had cars to take her out. She faced financial hardship as she was unable to work and her monthly NHS pension was less than a thousand pounds. She was not entitled to any benefits and rented her home.

- Whilst she appreciated that some people thought that degenerative disc disease was part of the ageing process and that it had many disposing factors, she did not accept that thirty years of “lifting, lowering, holding, pushing and pulling using the bodily force of the carer” was not wholly or mainly attributable to her NHS employment.

17. To support her claim Ms L referred to a number published articles:-

- An article in the September 2003 issue of the American Journal of Critical Care on Nurses and Preventable Back Injuries. The article concluded that nurses were being primarily injured while transferring or when lifting patients, either by cumulative injury or by a direct injury alone.

- An article in Nursing Matters, which concluded the consequences of musculoskeletal disorders among nurses included increased sickness absence and premature retirement and poor health. The most vulnerable and affected area was found to be the vertebral column, prevalently the lower back and the main risk factors which predisposed the nurse to work related musculoskeletal disorders were bending and twisting, and procedures such as bathing, dressing, seating and transferring patients.

- A study on the prevalence of lower back pain among nurses from a medical centre in Taiwan - published in the Taiwanese Journal of Obstetrics and Gynaecology in

August 2016. The questionnaire survey concluded that nurses were at higher risk than other health care professionals to suffer from injuries and work related musculoskeletal disorders, such as lower back pain, and injure their backs from the physical burden associated with manual handling of patients and persistent and repeated patient lifting and transferring.

- A July 2016 article by Dr Jiminez (Chiropractor) entitled 'Causes for Low Back Pain Among Nurses'. Dr Jiminez stated that nurses were considered to have the highest prevalence of lower back pain and back problems requiring medical and hospital intervention. He highlighted a study conducted in an acute care facility in Hong Kong which reported that over 80% of participants suffered from some form of back pain throughout their careers with one-third experiencing back pain at least once a month. The contributing factors were stooping whilst carrying out nursing duties and lifting and transferring patients. Most cases were reported on orthopaedic wards closely followed by elderly care.

- A 1995 article published in Occupational Environmental Medicine by Smedley, Egger, Cooper and Coggan. The survey of nurses employed by Southampton University Hospital Trust found the lifetime prevalence of back pain was 60% with 10% having been absent from work due to back pain for more than four weeks. Associations were found in relation to the frequency of certain lifting activities.

- An October 2002 article from BBC News. This concerned a nurse who had won a High Court case against an NHS trust after suffering a prolapsed disc at the age of thirty-six. The nurse did not suffer a specific accident. Ms L said the nurse's case was not dissimilar to her own.

18. NHS BSA referred Ms L's stage 2 appeal to its MA. The MA advised:

"In summary there is no doubt that [Ms L] has significant degenerative change in her spine. I do not dispute that [Ms L's] employment has contributed to the development of her symptoms. It may have contributed to the degenerative changes in her spine. However, on balance of probability, this contribution is less than 50%. In my opinion, the degenerative changes in Ms L's spine are not at least wholly or mainly attributable to her employment."

19. Accepting its MA's opinion, NHS BSA turned down Ms L's final appeal.

NHS BSA's position

20. NHS BSA says:-

- To qualify for a PIB the requirements of both regulation 3(2) and regulation 4(1) must be satisfied. The requirements are distinct.

- It is of the view that the Court of Appeal decision in *Young*[1] is not relevant in Ms L's case. This clarified the interpretation of regulation 4(1). It has not accepted that Ms L sustained an injury or contracted a disease which is wholly or mainly attributable

to her NHS employment. Therefore, the requirements of regulation 3(2) have not been met and it has not been necessary to consider regulation 4(1).

- Wholly or mainly attributable is defined as the sole, main or predominant cause; therefore, the NHS employment or duties of employment have to be more than 50% the cause of the injury or disease.

- Ms L has applied for a PIB on the grounds that the nature of her duties throughout her NHS employment has caused her degenerative spinal condition.

- The Scheme's MAs throughout the application and IDR process have concluded that Ms L's back conditions are not wholly or mainly attributable to her NHS employment or duties of employment. They have provided comprehensive reasons for their recommendations based on the evidence submitted and the current clinical understanding of the factors that cause degenerative disc disease.

- Each MA reached their recommendation independent of the previous MA's opinion.

- The Ombudsman will understand that in matters medical, decisions are seldom black or white. A range of options may be given from the various sources, all of which must be considered and weighed. However, the fact that Ms L does not agree with the conclusions drawn and the weight attached to various pieces of evidence does not mean that any conclusion is necessarily flawed.

Adjudicator's Opinion

21. Ms L's complaint was considered by one of our Adjudicators who concluded that no further action was required by NHS BSA. The Adjudicator's findings are summarised briefly below:-

    - To qualify for a PIB Ms L must satisfy a two-part test. The first question, under Regulations 3(1) and (2), is whether Ms L has sustained an injury (or contracted a disease) in the course of her NHS employment prior to 31 March 2013, which is wholly or mainly attributable to that employment or the duties of that employment. If that test is satisfied then the next question, under Regulation 4(1), is whether she has, as a consequence, suffered a PLOEA of greater than 10%. Answering either question Is a finding of fact for NHS BSA.

    - NHS BSA, and its MA, had applied the correct regulations.

---

[1] *Young v NHSBSA* [2015] EWHC 2686 (Ch)

- It is accepted that Ms L has a degenerative disease of the spine, but it is not accepted that it is wholly or mainly attributable to the duties of her NHS employment, in particular the manual handling of patients.

- The first MA was of the opinion that although the various lifting and manual handling aspects of Ms L's duties may have led to short term acute exacerbations of symptoms, the underlying disease process causing her disability and inability to work was constitutional and therefore could not be wholly or mainly attributed to her NHS duties. The MA said the degenerative changes in Ms L's spine and resulting disability were likely to have occurred regardless of her occupation. The MA concluded by saying that, on the balance of probabilities, the evidence did not confirm that Ms L's degenerative back disease was contracted in the course of her NHS employment and was wholly or mainly attributable to that employment.

- The MA's view at IDR stage one slightly differed from the first MA. The MA accepted that Ms L's spinal degenerative disease had been contracted in the course of her NHS employment, but said it could not be linked or attributed to any specific incident or event or her overall NHS duties, including the manual handling of patients. The MA referred to various studies which support the view that heavy work is not the cause of low back pain. The MA said it was accepted by most researchers that workers who undertook more moving and handling reported more low back pain and took more sick leave as a consequence, particularly nurses. However, this did not mean that the work caused the back pain. The MA said it was now understood that deterioration in the discs and facet joints of the spine was mainly determined by genetic inheritance. The MA said based on all of the evidence and the current medical understanding of the factors that cause degenerative disease of the spine, Ms L's work duties had not caused, accelerated or triggered her degenerative disease or precipitated her absence from work at a point in her career where she would otherwise have been fit to continue to work.

- The MA at IDR stage two said the degenerative changes in Ms L's spine had occurred during the course of her NHS employment in the sense that they had taken place when she was employed, but the changes would have occurred even if Ms L had not been employed. The MA said the conventional belief that heavy physical loading could result in early degenerative changes was not supported by studies and that the most likely explanation for the degenerative changes in Ms L's spine was that they were the end result of genetically determined disc degeneration that had been modified to some extent by behavioural and environmental factors. The MA said it was not possible to conclude, given the current understanding, that the changes in Ms L's spine were wholly or mainly attributable to her employment. In summary the MA said, there was no doubt that Ms L had significant degenerative change in her spine and did not dispute that her employment had contributed to the development of her symptoms and may have contributed to the degenerative changes in her spine. However, on balance of probability, the contribution was less than 50% and therefore the degenerative

changes in Ms L's spine were not at least wholly or mainly attributable to her employment prior to 31 March 2013.

- There were no grounds for finding that NHS BSA should not have accepted the views of its MA.
- There did not appear to be a difference of medical opinion between Ms L's treating doctors and the MA, but even if that was not the case, that was not sufficient for the Ombudsman to say that NHS BSA's decision was not properly made.
- There was nothing to suggest that any evidence had been ignored by the NHS BSA and/or its MA, rather NHS BSA had given greater weight to the advice from its MA which it was entitled to do.
- As Ms L's claim did not satisfy the first part of the test for a PIB she cannot have suffered a PLOEA in relation to the second part of the test as that question only arises if the first part of the test is passed.

22. Ms L did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Ms L provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the main points made by Ms L for completeness.

Ombudsman's decision

23. Ms L says whilst she appreciates that genetic, behavioural, environmental and social aspects are predisposing factors of degenerative disc disease, it cannot be ignored that there is still overwhelming evidence to suggest that repetitive strain injury and trauma are also significant predisposing factors.

24. Ms L says, on the balance of probability, her degenerative disc disease occurred as a direct result of her NHS employment and as a consequence she has suffered a PLOEA of greater than 10%.

25. My role in this matter is not to review the medical evidence and come to a decision on Ms L's eligibility for a PIB. I am primarily concerned with the decision-making process. That is, whether the relevant regulations have been correctly applied; whether appropriate evidence has been obtained and considered; and whether the decision is supported by the available relevant evidence. The weight which is attached to any of the evidence is for NHS BSA to decide; and NHS BSA may prefer evidence from its own MA; unless there is a reason why it should not, or should not without seeking clarification.

26. Ms L's opinion clearly differs from NHS BSA's and its MA. But, as the Adjudicator said, a difference of medical opinion is not sufficient for me to be able to find that NHS BSA's decision was not properly made.

27. I am satisfied that the relevant regulations have been correctly applied, that appropriate evidence has been obtained and considered and that NHS BSA's decision is supported by the available relevant evidence.

28. Therefore, I do not uphold Ms L's complaint.

Anthony Arter

Pensions Ombudsman
29 August 2018

Appendix

Summary of the Medical Evidence

Dr Henderson on x-ray of Ms L's lumbar spine, 4 November 1998

29. Dr Henderson reported minor degenerative changes with disc space narrowing particularly at L1/2 and L3/4.

Mr Bawarish, 10 March 1999 entry in orthopaedic notes

30. "Reviewed in clinic today, unfortunately without the benefit of the MRI scan. Provision report by Dr Henderson showed minor degenerative changes at L3/4 L4/5, no compression in nerve root. The patient's management is likely to be conservative in the form of exercises, back school. I have explained the nature of this problem, short and long term prognosis and the possibility of having some residual symptoms at the end of the day. I see no indication for surgical intervention. She will be reviewed again in six months time for clinical assessment and discharge."

Mr Pesic-Smith, SpR in Neurosurgery, 11 June 2014 report

31. In his report Mr Pesic-Smith says:

- Ms L reports a twenty-year history of low back pain for which she has taken a variety of analgesic medications. Her back pain is a fairly constant background discomfort, but has worsened over the last 6 months.
- During the last 4-6 months describes intermittent numbness and tingling over left thigh and left sided buttock and posterior thigh pain and bladder urgency when the pain is worst.
- Past medical history includes hypertension and depression.
- On examination, gait normal and can straight leg rise beyond 90 degrees bilaterally.
- "MRI scan of the lumbar spine demonstrates multi-level degenerative disease with marked disc dehydration, particularly L2/L3 and L3/4. There is degenerative scoliosis which is convex to the left and marked central canal stenosis at L4/5 contributing to left L4 foraminal stenosis."

Mr Dalwal, Spinal Fellow, 30 July 2014 report

32. Mr Dalwal confirmed a diagnosis of degenerative scoliosis with left thigh pain. For the thigh pain he advised a left L4 nerve root block. For the bladder symptoms he recommended a referral to a urologist for further evaluation. He said a small angle scoliosis was not likely to progress significantly.

Dr Siddiqui, Consultant in Anaesthetics & Pain Management, approved 2 October 2014 report

33. The report says:-

- On examination no clear neurological deficit, seemed slightly more stiff at the left paraspinal muscles but aside from that seemed to be functionally stable. However, MRI reports describe central canal stenosis at L3/L4 as well as L4/L5 level and also neural foraminal stenosis at L3 and L4 levels.

- Several options suggested to Ms L, including an epidural injection targeting the L4/L5 level and a left L4 nerve block. Ms L also referred to Physiotherapy.

Dr McKinty,GP, report to NHS BSA dated 22 April 2015 – requested in relation to Ms L's ill health application.

34. Dr McKimty said:-

- Referring to the GP records, 10 March 2014 first recorded low back pain that had been present for some time. 5 February 2014 diagnosed cervical spinal neural foraminal stenosis.

- Ms L's main problem was chronic back pain. She was currently awaiting to see a spinal surgeon. She had been on a cocktail of medications over the years.

- Over the last 18 months Ms L had received numerous letters from specialists regarding her chronic pain in the back, neck and knee. She had been referred to see a spinal surgeon as she was suffering from scoliosis.

- Ms L had had nerve block and epidural injections in the past but remained in pain.

- The conditions in her back and cervical spine were likely to deteriorate with time and it was unlikely that she would be able to return to her nursing duties.

Mr Tizzard, Consultant Spinal Surgeon, 9 September 2016 report

35. Reviewed Ms L in clinic today. Had done very well following her surgery, although using a stick to help her. Looks much straighter. Still has a slightly stooped posture and a twist on the spine within the brace. Leg symptoms improved, although still has some left sided sciatica at night.

36. X-ray of the lumbar spine showed implants had stayed firm. Ms L ready to start physiotherapy to try and retrain her muscles.

Mr Robson, SpR in Neurosurgery, 23 December 2016 report

37. On review:-

- Her condition has worsened since September 2016. Following the removal of the brace Ms L feels her posture is more stooped and does not have the strength to

keep upright. Recurrence of left leg pain exacerbated by lying flat and sleeps sitting up to help alleviate her symptoms. Walking distance drastically reduced.

- X-ray of spine shows some junctional kyphosis.

Mr Tizzard, 6 January 2017 letter to Ms L

38. "I have now had chance to discuss your case at the MDT with my colleagues. As we discussed when I saw you in the clinic I am going to ask Mr…to see you who does the majority of the scoliosis cases in this hospital and he performed the surgery with me when you had your operation before. Unfortunately the feeling at the meeting was that you are likely to require further surgery because your spine is continuing to tilt forward but Mr…wants to see you himself and discuss what the issues are and potential solutions with you."

Original decision, 11 January 2017 – MA's report

39. The MA noted:-

- The basis of Ms L's claim for a PIB.
- The relevant Scheme Regulations and criteria for such an award.
- That Ms L had been awarded Tier 2 ill health retirement in September 2015 for multilevel degenerative disease of the lumbosacral and cervical spines causing significant pain and impaired mobility.
- The evidence considered:-
    - Ms L's application form and enclosures.
    - Documentation pertaining to Ms L's ill health retirement application and appeal.
    - A statement from Miss L's NHS employer – County Durham and Darlington Foundation Trust (the **Trust**)
    - The Accident records / Incident records.
    - The General Practitioner's records
    - The Occupational Health records
- Ms L's claim that the degenerative disease of her spine was a result of repeated back trauma sustained whilst handling patients over her nursing career which started in 1984.
- There were no incident reports related to incidents, injuries or accidents from the Trust. In 1999 Ms L had stated that she had no underlying back problems. A staff report in 2000 mentioned musculo-skeletal issues. In 2012 there was no mention of back problems, the main cause of sickness was mental health issues. Sickness absence from 2014 was attributed to stenosis, arthritis and joint degeneration.

- Sickness absence records from September 2014 to April 2015 noted back problems. Prior to then the incidents of sickness absence from September 2005 were stated as “unknown”.

- The Occupational Health records made no reference to any back injuries or incidents prior to Ms L’s long-term sickness absence due to back pain in 2014.

- The first reference to chronic low back pain appeared in GP records on 10 March 2014. An MRI scan in 2000 showed no degenerative changes.

- Mr Pesic-Smith’s (SpR in Neurosurgery) letter of 11 June 2014, which referred to Ms L reporting a twenty year history of low back pain for which she had been taking a variety of analgesics. The back pain had worsened in the last 6 months and an MRI of the lumbar spine demonstrated multi-level degenerative disease.

40. The MA went on to say:

> “It is accepted that [Ms L] has degenerative disease of the spine which impacts on her ability to work due to impaired mobility and pain. However, the question is whether the underlying cause of her spinal degenerative disease is wholly or mainly attributable to her role as a Staff Nurse.
>
> Degenerative changes in the spine develop in the majority of people in their 30’s onwards. People have an individual constitutional susceptibility as to the severity and extent of the degenerative process regardless of occupation. An MRI in 2000 already showed [Ms L] to have degenerative changes indicating her underlying susceptibility to the disease process.
>
> Although the various lifting and manual handling aspects of her NHS role may have led to short term acute exacerbations of symptoms, the underlying disease process causing her disability and inability to work is constitutional and therefore cannot be wholly or mainly attributable to her NHS role. The degenerative changes in her spine and resulting disability are likely to have occurred regardless of her occupation.”

41. The MA concluded:

> “It is my opinion that, on the balance of probabilities, the evidence in this case does not confirm that the degenerative back disease was contracted in the course of the person’s NHS employment and is wholly or mainly attributable to that NHS employment.
> …
> There is no permanent loss of earnings as there is no attributable condition.”

IDR stage one, 3 April 2017 – MA’s report

42. The MA noted:-

- Ms L's age, NHS occupation, the basis of her claim, the relevant Scheme Regulations for a PIB, her Tier 2 ill health retirement award.

- The evidence considered:

  - all documents previously submitted including Ms L original and appeal application forms;
  - Ms L's February 2017 letter;
  - a hospital discharge letter dated 28 June 2016; and letters from Mr Tizzard (Consultant Spinal Neurosurgeon) and his colleague in spinal neurosurgery date 9 September 2016, 23 December 2016 and 6 January 2017.

43. The MA considered the date of onset of Ms L's disease, deciding the evidence indicated that it had commenced prior to 31 March 2013.

44. The MA next considered whether the condition had been contracted in the course of Ms L's NHS employment. The MA noted:-

- The commencement of Ms L's NHS employment in 1984.

- That in November 1998 Ms L's GP had referred her to a specialist as she had been experiencing increasingly severe back pain for 3 months or so. An MRI scan showed minor degenerative changes in Ms L's lumbar spine at L3/4 4/5. An x-ray showed degenerative changes with disc space narrowing, particularly at L1/2 and L3/4.

- In January 2000 Ms L attended an orthopaedic clinic for back pain.

- GP records showed prescriptions for anti-inflammatory treatment on many occasions from February 2000. Mr Sattar's (Rheumatologist) letter of 23 February 2000, described mechanical low backache, which had improved with physiotherapy, and thought Ms L had "palindromic rheumatism".

- At the end of January 2001 Ms L attended the Accident and Emergency department for a spasm in the left shoulder and back after rolling a patient. She was advised to take her own anti-inflammatory medication. There was not note of attending her GP or time off work.

- In 2002 Ms L's GP completed an insurance questionnaire for Ms L stating that she had mechanical back pain which had been present 1999.

- Ms L was referred to a back pain clinic in late August 2007 and offered a spinal rehabilitation programme, but did not attend.

- Ms L attended physiotherapy in February 2011 for left buttock and leg pain and was considered to have "chronic pyriformis syndrome". In March 2014 she saw her GP, complaining of a long history of back pain with "recent flares", but no

indication of any work-related component or acute injury. An MRI scan in 2014 showed widespread degenerative disease.

- Ms L first attended occupational health with back symptoms in March 2000. There was no indication of any injury occurring at work. She was noted to have "a musculoskeletal condition and back pain, in addition to which she is 6 feet tall."

45. On the basis of the evidence the MA said it could be accepted that Ms L's spinal degenerative disease was contracted around August 1998, albeit it could not be linked or attributed to any specific incident or event.

46. The MA next considered whether Ms L's condition was wholly or mainly attributable to her overall NHS duties, including the manual handling of patients.

47. The MA referred to the American Medical Association Guides to the Evaluation of Disease and Injury Causation (2nd Edition 2014). Low back pain was expected in 80% of people over their lifetime. Traditionally it was considered lifting at work would cause wear and tear of the discs, but it was now understood that deterioration in the discs and facet joints of the spine is mainly determined by genetic inheritance.

48. The MA referred to various studies which had concluded that heavy work was not a cause of low back pain. The MA said only a minority of studies had showed a weak association.

49. The MA said studies of Nurses indicated only weak relationships between the extent of moving and handling and a close-response curve had not been demonstrated. Nurses who reported the highest lifting exposures had less sick leave due to back pain than others with lower work demands.

50. The MA said it was accepted by most researchers that workers who undertook more moving and handling reported more low back pain and took more sick leave as a consequence, particularly nurses. However, this did not mean that the work caused the back pain; it was likely that it arose because it was more difficult to do a heavy job moving and handling patients, bending and stretching when suffering from back pain.

51. The MA went on to say:

"The evidence overall is considered to indicate that this applicant has extensive degenerative disease of the spine. It is accepted that she developed or "contracted" this disease during the period when she was employed as a nurse. There is insufficient evidence to indicate that her symptoms started whilst working, on any particular day.

It is not accepted that degenerative disease of the spine (M47.8) [the ICD code for this condition] arose wholly or mainly due to her NHS duties. In this case, the work duties are not considered to have caused, accelerated or triggered her disease or precipitated absence from work at a point in her career where she would otherwise

have been fit to continue to work, based upon all of the evidence and on current medical understanding of the factors that cause degenerative disease of the spine.

The statutory criteria for award of permanent injury benefits at paragraph 3(2) are not considered to have been met in this case, on the basis of the evidence presented.

…

There are no conditions which have been wholly or mainly attributed to the applicant's NHS duties. Therefore there is no consequential loss of work capacity and no loss of earnings, either on a temporary or a permanent basis."

IDR stage two, 28 September 2017 – the MA's report

52. The MA noted the evidence considered:-

- GP's report dated 22 April 2015 and print out of GP records.
- Mr Tizzard's reports dated 9 September 2016 and 6 January 2017.
- Mr Robson's (Specialist Registrar in Neurosurgery) report dated 15 December 2016.
- MRI of lumbar spine dated 14 February 2016.
- Dr Siddiqui's (Consultant in Pain Management) report of 2 October 2014.
- Mr Dalwal's (Spinal Fellow) report of 30 July 2014
- Mr Pessic-Smith's (Specialist Registrar in Neurosurgery) report of 2 June 2014.
- Mr Bawarish's entry in orthopaedic notes dated 10 March 1999.
- Dr Henderson's (Consultant Radiologist) report of 4 November 1998
- Ms L's completed pre-employment questionnaire dated 14 October 2014
- Ms L's personal statement.

53. The MA said:-

- The degenerative changes in Ms L's spine had occurred during the course of her employment in the sense that they had taken place when she was employed. But the changes would have occurred even if Ms L had not been employed.

- The conventional belief that heavy physical loading could result in early degenerative changes was not supported by studies.

- The most likely explanation for the degenerative changes in Ms L's spine was that they were the end result of genetically determined disc degeneration that had been modified to some extent by behavioural and environmental factors.

- It was not possible to conclude, given the current understanding, that the changes in Ms L's spine were wholly or mainly attributable to her employment. On the balance of probability. Ms L's condition was not wholly or mainly attributable to her employment.

54. Commenting on a number of publications that Ms L had cited in support of her application the MA said:-

- The article in the American Journal of Critical Care was a guest editorial and did not constitute original published research.

- The study in the Taiwanese Journal of Obstetrics and Gynaecology was based on a self-completed questionnaire. The study acknowledged that this could result in the severity of the back pain being overestimated due to bias. It was also accepted that the prevalence of back pain the study found was higher than reported in other medical centres in Taiwan and much higher than the prevalence rates reported in studies in North America and Europe.

- The article by Dr Jiminez did not appear to be based on original research and cited unreferenced studies undertaken by others. In the absence of any information about the original studies it was inappropriate to attach significant weight to the article.

- The study by Smedley and colleagues from 1995 reported a lifetime prevalence of back pain of 60% in nurses. Putting this into context Cheung and Al Ghazi writing in 2008 cited an earlier publication published in the New England Journal of Medicine in 1988 reporting that 90% of US adults experience back pain at some point in their life and three UK studies published between 1992 and 1996 indicating that 59% of UK adults experience back pain in their lifetime. These figures were not dissimilar to the figure of 80% of Americans stated by Modic and Ross in 2007. Unquestionably back pain was common in nurses, but as these studies demonstrated, back pain was equally common among the general population.

55. The MA referred to two articles. The first published in 2012 in Advances in Orthopaedics, which concluded that disc degeneration was a multifactorial occurrence with a strong genetic component. The second published in 2004 in Spine which suggested that physical loading specific to occupation and sport had a relatively minor role in disc degeneration.

56. The MA concluded:

"In summary, there is no doubt that [Ms L] has significant degenerative change in her spine. I do not dispute that [Ms L's] employment has contributed to the development of her symptoms. It may have contributed to the degenerative changes in her spine. However, on balance of probability, this contribution is less than 50%. In my opinion, the degenerative changes in Ms L's spine are not at least wholly or mainly attributable to her employment.

Based on the evidence presented, I conclude that the applicant **has NOT** sustained and injury or contracted a disease wholly or mainly attributable to the duties of the NHS employment prior to 31 March 2013."